SUPREME COURT OF NOVA SCOTIA
Citation: Toronto-Dominion Bank v. Stevens, 2011 NSSC 343

Date: 20110914
Docket: Hfx No. 313164
Registry: Halifax

Between:

The Toronto-Dominion Bank

Plaintiff

v.

Gerald Leonard Stevens and Veronica Mary Stevens

Defendants

Judge:	The Honourable Justice Peter P. Rosinski.
Heard:	August 11, 2011, in Halifax, Nova Scotia
Counsel:	Jason Cooke, for the plaintiff Veronica Mary Stevens, Self-represented - Not present

By the Court:

Introduction

[1] On August 26, 2010, the Bank obtained a deficiency judgment against Mr. Stevens alone in the amount of $95,073.21. This calculation was based on a sheriff's sale of the property to the Bank on January 28, 2010. The Bank bid $85,000 [see Exhibit D to May 11, 2010, affidavit of Andrew Rankin filed in this proceeding]. An appraisal value estimated $90,000 would be a reasonable "sale price" [estimated December 22, 2009, and noted to be for an "uninhabitable" dwelling house - see Exhibit "A" to the affidavit of Kathy Dokton filed herein on August 9, 2010].

[2] By letter dated August 24, 2010, counsel for the Bank wrote to the Prothonotary and advised that:

> We currently have a motion for deficiency judgment scheduled for Thursday, August 26, 2010 in general chambers. Unfortunately we have been unable to locate Ms. Veronica Stevens in order to [effect] personal service. However, we have been able to [effect] personal service on Mr. Gerald Stevens and will be proceeding with the motion against him...We respectfully request that the matter against Ms. Stevens be adjourned without day.

[3] The Bank obtained an order for substituted service on Ms. Stevens, on February 24, 2011, and an amended order on March 23, 2011.

[4] On or about June 16, 2011, Ms. Stevens was substitutionally served. The associated motion for deficiency judgment had been set down for hearing on July 19, 2011, before me.

[5] At that time the Bank sought a deficiency judgment in the amount of $134,682.25 against Ms. Stevens alone.

[6] Between the August 26, 2010, deficiency judgment of $95,073.21 solely against Mr. Stevens, and the sought after deficiency judgment of $134,682.25 solely against Ms. Stevens, the Bank sold the property on September 13, 2010, to third parties for a $60,000 sale price.

[7] This $25,000.00 difference between the successful bid price ($85,000) by the Bank on January 28, 2010, and the actual sale price on September 13, 2010, ($60,000.00) accounted for a much more substantial deficiency judgment claim by the Bank against Ms. Stevens.

Chambers July 19, 2011

[8] At the July 19, 2011 hearing I queried counsel as to whether there could be more than one deficiency judgment on the same foreclosure action, and specifically more than one deficiency judgment amount in the circumstances of this case? I received their submissions in chambers August 11, 2011.

[9] This decision will explain my reasons for now refusing to order a different deficiency judgment amount against Ms. Stevens.

Does an order for foreclosure, possession and sale allow for more than one deficiency judgment as against the joint tenants herein?

Preliminary issue - is the Motion filed within 6 months of the effective date of the default judgment?

[10] As the Bank points out, *Civil Procedure Rule* 72.12 requires that if the sale of a foreclosed property is to be by way of public auction, a mortgagee who seeks

an assessment of the deficiency must file a notice of motion to assess the amount of the deficiency within six months after the effective date of the default judgment.

[11] This is so because *Civil Procedure Rule* 72.11(6) reads:

> The judgment extinguishes six months after its effective date, unless a notice of motion for an assessment of the amount of the deficiency is filed.

[12] As a preliminary matter I had also queried counsel as to whether their Notice of Motion had been filed within six months of the effective date of the judgment. Of interest to this issue are Justice Edwards' comments in *Inrich Business Development Centre Ltd. v. LeBlanc*, (1997) 161 N.S.R. (2d) 140, [1997] N.S.J. No. 183 (S.C.) and his reference to Justice Kelly's liberal interpretation of the old rules regarding filing of [motions] for deficiency judgment deadlines in *Prenor Trust Co. of Canada (Liquidator of) v. Spiropoulos*, [1996] N.S.J. No. 549 (S.C.).

[13] At this juncture it is useful to recite *Civil Procedure Rule* 72.11 [Deficiency Judgment], *Civil Procedure Rule* 72.12 [Motion for Deficiency Judgment] and *Civil Procedure Rule* 72.13 [Calculation of Deficiency]:

72.11 (1) A statement of claim or notice of application for foreclosure, sale, and possession may include a claim against a person who is liable for the amount, if any, by which the mortgage debt exceeds the amount realized from the sale.

(2) A mortgagee who claims a deficiency judgment may have default judgment for the deficiency against the party claimed to be liable for the mortgage debt, unless the party claimed against files a notice of defence or contest, or attends at the hearing of the application for an order for foreclosure, sale, and possession and obtains permission to contest the claim.

(3) The effective date of the default judgment is fifteen days after the applicable of the following dates:

(a) the date of a sale by public auction, if the mortgagee purchases the property;

(b) the day the balance of the purchase price is paid to the sheriff or other person conducting a sale by public auction, if a person other than the mortgagee purchases the property;

(c) the date of closing, if the sale is by approved agreement.

(4) The amount of the default judgment must be assessed by a judge.

(5) Interest is calculated in accordance with the mortgage until the effective date of judgment and in accordance with the Interest on Judgments Act afterwards.

(6) The judgment extinguishes six months after its effective date, unless a notice of motion for an assessment of the amount of the deficiency is filed.

72.12 (1) A mortgagee who seeks an assessment of a deficiency must file a notice of motion to assess the amount of the deficiency before one of the following deadlines:

(a) six months after the effective date of the default judgment, if the sale is by public auction;

(b) ten days after the day of the closing of a sale by approved agreement.

(2) A mortgagee who makes a motion for a deficiency judgment against a party who has not designated an address for delivery must, unless a judge orders otherwise, give notice of the motion to the party in the same way a party is notified of a proceeding under Rule 31 - Notice, as if the notice of motion were an originating document.

(3) The notice must be delivered no less than ten days before the day the motion is to be heard, unless a judge orders otherwise.

72.13 (1) A judge may calculate the deficiency by subtracting one of the following amounts from the outstanding principal, mortgage interest, judgment interest, reasonable charges authorized by the mortgage instrument, and costs:

(a) the balance of the sale price paid to the mortgagee, if the property is sold by public auction or approved agreement to a person other than the mortgagee;

> (b) the amount reasonably realized on resale, if the property is sold by public auction to the mortgagee or its agent, it is resold by the mortgagee, and the resale price received by the mortgagee is both reasonable and greater than the bid;
>
> (c) the amount bid by, or on behalf of, the mortgagee, if the property is sold by public auction to the mortgagee and the resale price or the value of the property is less than the bid;
>
> (d) the value of the property, in all other circumstances.
>
> (2) A mortgagee who claims that an expenditure is a reasonable charge authorized by the mortgage instrument must demonstrate the claim by evidence specifically set out in an affidavit of the mortgagee, or its agent, showing all of the following:
>
> (a) the term in the instrument authorizing the expenditure to be made and charged to the mortgage debt;
>
> (b) the necessity of the expenditure for preserving or otherwise protecting the mortgaged property;
>
> (c) the reasonableness of the amount of the expenditure both in its fairness for the work done or materials supplied, and its value for protecting the property.

[14] Notably the *Civil Procedure Rules* do not define "month", but *Civil Procedure Rule* 94.02(5) references the *Time Definition Act*, R.S.N.S. 1989, c.469, and that Act defines "month" as "...where it occurs or is stated as in s. 2, means a calender month." By filing its Motion for Deficiency Judgment on July 28, 2011,

the Bank did so by "six months after the effective date of the default judgment" - CPR 72.12(1)(a) - since the effective date of the default judgment was 15 days after January 28, 2010.

The nature and context of deficiency judgments

[15] Bruce Ziff in his text, Principles of Property Law, 5th ed. (2010) Thomson Reuters Canada Limited, Toronto, Canada, succinctly states the historical underpinnings of foreclosures at p. 444:

> ***(d) foreclosure[82] (and redemption)***
>
> The idea behind foreclosure can be understood by recalling the structure of the mortgage at common law. As we have seen, in the seventeenth century this took the form of a grant in fee simple to the mortgagee that was subject to a proviso for reconveyance once the debt was repaid. The failure to do so meant that the mortgagor's rights to the property were terminated. The potential for hardship aroused the interest of the Chancery. In response, equitable principles emerged that allowed for a redemption of the property even after the due date (the 'law day') had come and gone. However, some limit had to be imposed on this ability to redeem. The mortgagee was entitled to expect that at some stage the security could be realized to the exclusion of the original owner. After all, that is the very purpose of the security component of the loan. Equity was quite prepared to acknowledge this reality. A procedure for terminating - foreclosing - the mortgagor's equity of redemption was thus developed.

[16] Foreclosures in Nova Scotia involve some significant differences from the comparable processes in other provinces - see the brief summary in Falconbridge on Mortgages, 4th ed., (1977) Canada Law Book Limited, Agincourt, Ontario, Canada at pp. 522-526.

[17] Notably in Nova Scotia, notwithstanding that the mortgagee has taken the equitable **and** legal title to the land upon purchasing it at a Sheriff's sale (once confirmed by the Court), the mortgagee remains permitted, if the mortgagor was a party to the foreclosure and sale proceedings, to thereafter claim payment of any deficiency from the mortgagor, or to realize on collateral security (without re-opening the foreclosure, as required in Ontario for example).

[18] This distinction has created a necessary bulwark of jurisprudence specific to Nova Scotia.

[19] Consequently our *Civil Procedure Rules (2009)*, and associated Practice Memorandum No. 1 are also distinctive.

[20] Our *Civil Procedure Rules* applicable to foreclosures have evolved in recent years, which evolution has been reflected in significant differences between the 1972 Rules, the amendments thereto between 1972 and 2009, and the 2009 Rules.

[21] Part of that evolution is neatly summarized by Bateman, J. in *Royal Bank of Canada v. Marjen Investments Ltd.* (1998) 164 NSR (2d) 293, [1998] N.S.J. No. 4 (CA) - especially see paras. 18 to 31, and 47 to 54.

[22] With specific reference to deficiency judgments, Justice Bateman for the Court, stated at paras. 28 and 31 respectively:

> 28 The primary purpose of the appraisal reports, on an application for a deficiency, is to assist the Court in fixing a fair value when the mortgagee has purchased the property at the Sheriff's sale, often for a nominal amount, and has not resold it. Where the property has been resold, an appraisal report provides the Court with a hypothetical value to which to compare the price actually realized. If there is little difference, the inquiry into the reasonableness of the resale price is simplified. Where, however, there is a significant difference in the two values, the Court will more closely scrutinize the circumstances surrounding the resale.
>
> 31 The Court's focus on an application for deficiency judgment on foreclosure is to ensure that the mortgagee recovers no more than "is just and reasonable" (per Hart, J.A. in Adshade, supra). When the mortgagee has purchased the property at the Sheriff's sale, and applies for a deficiency judgment, prior to resale, it is reasonable for the Court to look to objective evidence of value (per Hallett, J.A. in Nova Scotia Savings and Loan v. MacKay, supra). It may be that the price paid by the mortgagee at the sale is an acceptable amount, particularly where there has been competitive bidding. On the other hand, the purchase price may be nominal,

> in which case, it is appropriate to assign a more realistic value. This ensures that the mortgagee does not, after obtaining a deficiency judgment, resell the property for an amount greater than the price paid at the Sheriff's sale and thereby effect double recovery. Where the property has not been resold, the best evidence of value is generally established through appraisals. When the property has been resold, however, and, particularly, when subjected to vigorous marketing efforts, as in Offman, supra, the Court should generally not depart from the selling price. Appraisal reports are a best guess, albeit by a person experienced in the real estate field. It is the market that actually determines the value of the property.

[23] Her reference in para. 31 to the Court's role as being "to ensure that the mortgagee recovers no more than is 'just and reasonable' (per Hart, JA in *Adshade* supra.)" continues to be echoed by our Court of Appeal. As Chief Justice MacDonald observed in *Bank of Nova Scotia v. Allen* 2010 NSCA 47, (2010) 291 N.S.R. (2d) 284 at para. 14 (regarding protective disbursements claimed by a mortgagee):

> 14 Finally it must be remembered that, under our Civil Procedure Rules, the court serves as a watchdog, overseeing every expenditure claimed by a mortgagee.

[24] Nevertheless, as Hallett, J. stated for the Court in *Canadian Imperial Bank of Commerce v. R. England's Warehouse Ltd.* (1996) 147 N.S.R. (2d) 321 [1996] N.S.J. No. 23 (CA) at para. 59 regarding the Courts' role in overseeing the price paid by third parties or a fair market value when the mortgagee buys the property at public auction:

> It is only the inherent equitable jurisdiction of the court that can be invoked and then only in the most extraordinary circumstances of the sort referred to by Hart J.A. that had occurred in MacDonald v. Hirsch, et al (1932-33), 5 M.P.R. 469 where the mortgagee's conduct in realizing on the loan security was clearly unacceptable.
>
> [see also Bateman, J.'s comments in *Federal Business Development Bank v. Silver Spoon Desserts Enterprises Ltd.* (1995) 144 N.S.R. (2d) 161 [1995] N.S.J. No. 359 (CA) at para. 15.]

[25] In *Allen* at para. 14, the Court also confirmed that a mortgagee, who buys the property at public auction, and holds it at the time of a deficiency judgment motion hearing, is entitled to recover those protective disbursements that are:

> "...supported by the mortgage contract; necessary to "preserve" or "protect" the property, and are "reasonable."

[26] There is a clear obligation on our Courts to be watchdogs over the entire foreclosure process, especially since it is unusual for mortgagors to contest foreclosure proceedings generally, and specifically motions for deficiency judgments.

Application to the Case at Bar

[27] Mr. and Ms. Stevens were joint tenants, and signed the mortgage herein on February 27, 2006. In clause 16(h) of the mortgage, it deals with the ambit of specific words and phrases used in the document, and ends as follows:

> "... words in the singular include the plural and words in the plural include the singular, and words importing the masculine gender include the feminine and neuter genders where the context so requires, and **whenever two or more persons are under a liability here under, such liability shall be both joint and several**."
>
> [see also clause 17(g).]

[28] In its Notice of Application in Chambers (as amended) the Bank claimed at para. 6(f) as relief:

> "An Order for the deficiency, if any, between the amount realized after sale pursuant to an Order for Foreclosure, Sale and Possession, and the aggregate due, as claimed above."

[29] In para. 6(a) the Bank had claimed:

> "Payment of the total outstanding, together with interest at the rate set out in the mortgage, as amended, on the sum of "$145,412.34 from March 5, 2009 until the date of the default judgment."
>
> [See also CPR 72.11(5) which makes it clear that it is until the "effective date of judgment", as confirmed by Court order regarding the Sheriff's sale, that the contractual rate of interest may be properly claimed by a mortgagee.]

[30] Thus the contractual interest rate only applied until January 28, 2010 plus 15 days. At that time also Mr. and Ms. Stevens lost their right to redeem the mortgage [*Bank of Nova Scotia v. 1890486 Nova Scotia Ltd.* 2004 NSCA 6] and formally became jointly and severally liable for the amounts that would consequently be assessed by the Court as reasonable; provided for in the mortgage; pleaded; and that are the product of a fair or equitable process. [See also s. 42 *Judicature Act* RSNS 1989 c. 240 regarding discontinuance of foreclosures.]

[31] In my view, given the wording of the mortgage here rendering Mr. and Ms. Stevens jointly and severally liable, it would be inconsistent to have Mr. Stevens liability, as fixed at $95,073.21 on August 26, 2010, now to be held to also be the claimed deficiency amount against Ms. Stevens (either $106,018.10 or $101,018.10 as of April 18, 2011, using the $90,000 appraisal value or the $85,000

bid price the Bank bought the property with on January 28, 2010 - see Bank's brief of August 9, 2011, p. 6).

[32] Such a result is inequitable, inconsistent with the parties' agreement intentions as reflected in the mortgage, and effectively causes the Order of Justice Duncan on August 26, 2010 to be overridden by any Order of mine in August 2011. It cannot be so.

[33] The wording in the mortgage suggests that Mr. and Ms. Stevens would be jointly and severally liable for the same amount. Once the amount is assessed, it cannot be revisited, absent exceptional circumstances, which do not exist here.

[34] Moreover, the reality that there can only be one effective date of default judgment after which the contractual interest rate no longer applies, also signals that only one deficiency judgment amount should result from the foreclosure proceedings herein.

[35] The *Civil Procedure Rules* and existing jurisprudence (where the mortgage also permits this) clearly support a mortgagee's right to:

(i) Purchase the property itself at public auction;

(ii) Maintain the property with reasonable care to obtain a fair price on resale to a third party;

(iii) Claim for any "protective" disbursements incurred for the purpose of preserving the property's value;

(iv) Claim for any deficiency between, the amount realized on sale to the mortgagee (based on appraisals usually) or to the point of resale to a third party as the case may be, and the amount found to be owing to the mortgagee by the mortgagor(s).

See for example: *Nova Scotia Savings and Loan Co. v. MacKay and MacCulloch* (1979) 41 N.S.R. (2d), 432 (S.C.) [1979] N.S.J. No. 768 per Hallett, J. as he then was; *Canadian Imperial Bank of Commerce v. R. England's Warehouse Ltd.* (1996) 147 N.S.R. (2d) 321 [1996] N.S.J. No. 23 (CA) per Hallett, JA; *Royal Bank of Canada v. Marjen Investments Ltd.* (1998) 164 N.S.R. (2d) 293 [1998] N.S.J. No. 4 (CA) per Bateman, JA; *Bank of Nova Scotia v. Allen* 2010 NSCA 47 [2010] N.S.J. No. 307 (CA) per MacDonald, CJNS.

[36] Correspondingly, the Rules and jurisprudence impose obligations on mortgagees. They must act not only within the terms of the mortgage and the pleadings, but also in a fair fashion, and always be ready to demonstrate that the actions taken to preserve the property value, or satisfy their legitimate claims, are reasonable.

How does the Bank in this case fare under such analysis?

[37] I have not been referred to any cases, nor could I find any authority that clearly addresses the issue raised in this case. Consequently, I will rely on fundamental principles and the Rules to decide this issue.

[38] Both Mr. and Ms. Stevens were given notice of the foreclosure, but neither filed a defence. Mr. Stevens had notice of the first deficiency claim hearing, whereas Ms. Stevens did not.

[39] Does this fact affect the applicability of the first deficiency judgment to Ms. Stevens? I do not think so, since she was ultimately served June 16, 2011, in advance of the July 19, 2011 scheduled second deficiency judgment hearing.

While I tend to think that the only deficiency judgment possible herein crystallized with Duncan, J.'s August 26, 2010 Order, at least Ms. Stevens had an opportunity (albeit late) to appear and make submissions regarding her own personal status *vis-a-vis* any deficiency judgment. She ultimately did not appear or make any submission to the Court.

[40] As against both Mr. And Ms. Stevens the Bank filed its motion on July 28, 2010. The default judgment remained vital, and was extant at the time of the deficiency claim hearing on August 26, 2010. That is so because as Practice Memorandum No. 1 states at para. 2.11:

> ...Enforcement of the judgment is stayed until the plaintiff establishes there is a deficiency and the court has determined the amount of the deficiency. Therefore, a Certificate of Judgment cannot be issued by the prothonotary nor recorded in the Land Registration Office until such amount has been determined.

[41] Presumably it is this inability to have a judgment issued and registered, that motivates mortgagees to not unduly delay their motions for deficiency judgment. There is no deadline otherwise imposed upon mortgagees once they have filed their Notice of Motion within the 6 months of the effective date of default judgment, other than the court's supervision of progress of the motion.

[42] Does the enforcement of the judgment against Mr. Stevens on August 26, 2010 preclude the Bank from now seeking to enforce the judgment against Ms. Stevens for a different amount of money?

Position of the Bank

[43] In the case at Bar, the Bank argues that “it is not unheard of to have separate deficiency hearings against co-respondents, particularly when there are service [of documents] issues with one party... the result would be separate hearings and deficiency judgment amounts, if the applicant obtained judgment in both instances.” - p.4 August 9, 2011 Brief. No authority was cited in support such practice, if it has occurred in the past.

[44] This position presumes that under our Rules a mortgagee can effectively obtain more than one default judgment on the same foreclosure of a mortgage.

[45] I disagree with this interpretation of the Rules. Determining the deficiency is merely a calculation of the amount owing on the judgment. Rule 72.11, 72.12

and 72.13 all read in the singular: “the sale”; “a sale”; “the default judgment”; “subtracting one of the following amounts”; “the deficiency”.

[46] Practice memorandum No. 1 at para. 2.11 states:

> The plaintiff shall have judgment against each defendant liable on the covenants effective the day payment is made to the plaintiff or if no payment is made 15 days after the sale. [i.e. effective date of default judgment - *Civil Procedure Rule* 72.11(3)].

[47] The Rules have the status of legislation and “... must be interpreted in accordance with the principles for interpretation of legislation.” - *Civil Procedure Rule* 94.01(1).

[48] Statutory interpretation was recently commented on by the Court of Appeal in *R v. R.V.F.*, 2011 NSCA 71 per Beveridge, JA at para. 29 (albeit in the context of the criminal law (i.e. *Youth Criminal Justice Act* and Federal *Interpretation Act*):

> A word or phrase should not be examined in isolation, but in context and in accord with the recognized principles of statutory interpretation. The correct approach to statutory interpretation is straightforward and oft repeated. Recently in *Cape Breton (Regional Municipality) v. Nova Scotia (Attorney General)*, 2009 NSCA 44, MacDonald, C.J.N.S. wrote:

> [36] The Supreme Court of Canada has endorsed the "modern approach" to statutory interpretation as expounded by Elmer Driedger, **Construction of Statutes**, 2nd ed. (Toronto: Butterworths, 1983) at p. 87:
>
> > ... the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> See **Re Rizzo and Rizzo Shoes Ltd.**, [1998] 1 S.C.R. 27 at 41; **Canada (House of Commons) v. Vaid**, 2005 SCC 30, [2005] 1 S.C.R. 667; and **Imperial Oil Ltd. v. Canada; Inco Ltd. v. Canada**, 2006 SCC 46, [2006] 2 S.C.R. 447.

See also: *Coates v. Capital Health District Authority*, 2011 NSCA 4; *Nova Scotia (Health) v. Morrison Estate*, 2011 NSCA 68, at para. 14.

[49] As required, I will consider:

> 1 - what is the meaning of the text found in the Rules?
>
> 2 - What did the “legislature” intend in writing the relevant Rules as it did? What was its purpose?
>
> 3 - What are the consequences of a proposed interpretation?

[50] In so interpreting the Rules, I accept that they are generally to be consistently, yet liberally, interpreted, keeping in mind their object as contained in *Civil Procedure Rule* 1.01:

> These Rules are for the just, speedy, and inexpensive determination of every proceeding.

[51] To my mind the **texts** of *Civil Procedure Rule* 72.11, 72.12 and 72.13 are not ambiguous. They contemplate one default judgement per foreclosure.

[52] It would seem to naturally follow that they therefore also contemplate only one deficiency judgment (calculation) per default judgment in foreclosures.

[53] Notably, the only reason that the Bank is in a position to argue its second claimed deficiency judgment against Ms. Stevens alone, is as a result of its inability to have had Ms. Stevens served in time for the August 26, 2010 hearing before Justice Duncan.

[54] It would be a perverse result if the Rules were read to support the Bank's position in this case. Moreover, their position is generally not supportable without clear authority or jurisprudence to that effect.

[55] The Rules provide for the situation where the mortgagee purchases the property, and then resells it to a third party before claiming deficiency judgment.

[56] However, CPR 72.13 [Calculation of Deficiency] does not contemplate separate deficiency calculations for both scenarios presented in the case at bar, which arise merely because there are two mortgagors and they were not both served in time for the first deficiency calculation hearing.

[57] *Civil Procedure Rule* 72.13 contemplates that the judge in calculating the deficiency, "subtract **one of the following amounts**":

> ... (b) the amount reasonably realized on resale, if the property is sold by public auction to the mortgagee or its agent, it is resold by the mortgagee, and the resale price received by the mortgagee [$60,000 in this case] is both reasonable and greater than the [mortgagee's] bid [$85,000 in this case];
>
> (c) the amount bid by, or on behalf of the mortgagee, if the property is sold by public auction to the mortgagee and the resale price [$60,000 in this case] or the value of the property [$90,000 appraisal in this case] is less than the bid [$85,000 in this case];
>
> (d) the value of the property [$90,000 appraisal in this case] in all other circumstances.

[58] I should note that, since the $90,000 appraisal is from December 22, 2009, it is more appropriate for that amount to be considered as a fair market value estimation for only a relatively short time period thereafter in order to place any significant weight on its continued validity.

[59] The timeliness factor also tends to support the position that only one deficiency judgment is contemplated by the Rules. Otherwise, in a case such as the one at Bar, not only is an updated appraisal not feasible, because the property has passed into third party hands, but also since CPR 72.13 should not be read as applicable any longer because all the touchstones therein [i.e. the mortgagee's bid; the amount realized on resale] and specifically the ordering of a deficiency judgment amount have already occurred.

[60] There is no further bid or sale. To the extent that one could argue there could be an appraisal tendered on the second deficiency calculation to reflect "the value of the property", that calculation is moot. The property has already been sold - there is no reason for a deficiency calculation anymore.

[61] In summary, the meaning of the texts of CPR 72.11, 72.12 and 72.13 are not ambiguous, and clearly mean that the Rules only intend one deficiency calculation for each default judgment in foreclosures.

[62] The **purpose** of these Rules is to provide a structure to the process of assessing deficiency judgment claims, and as Bateman, JA. stated in *Marjen*: "to ensure that the mortgagee recovers no more than is 'just and reasonable' (per Hallett, JA in *Adshade* supra)".

[63] No doubt, the Rules are written to allow for the fair and timely disposition of cases as well. It is doubtful that those purposes are being met in the case at Bar.

[64] The Notice of Motion for Deficiency Judgment was filed on July 28, 2010. Ms. Stevens was not served until June 16, 2011. In the meantime, the Bank's claim had gone from $95,073.21 on August 26, 2010 to its present claim of $106,018.10 or $101,018.10 (depending on whether the $85,000 bid or $90,000 appraisal is used to reduce the deficiency) as stated in its August 9, 2011 written submissions. Notably in its letter June 15, 2011, filed as written submissions for

the July 19, 2011 Chambers hearing, the Bank's claim for deficiency judgment was $134,682.25.

[65] The basis for these differences is explained in the Bank's written submissions, but I must add that the differences are also based on affidavits of Christine Burstyn, sworn August 8, 2011 and of Isabel Johnstone, sworn June 6, 2011 and filed August 9, 2011 and June 17, 2011 respectively.

[66] Ms. Stevens was substitutionally served by newspaper ad inserted June 16, 2011 and letters posted on that date - see affidavit of Sarah Rygiel, sworn July 19, 2011. Ms. Stevens did not have notice of Ms. Burstyn's affidavit, nor had she received the Bank's updated submissions of August 9, 2011.

[67] It is vital that mortgagors' interests be protected by the Court. If the mortgagor is not present, or has not received timely notice of the mortgagee's factual or legal position, the Court must be ever diligent to ensure no unfairness results to the mortgagor.

Next I will examine how would the Bank's proposed interpretation manifest itself?

[68] As in this case, the Bank's **proposed interpretation** could involve, grossly different amounts of deficiency judgments as against different mortgagors to the same mortgage. The Bank argues it can invoke CPR 72.13(1) twice in the case at Bar. Once regarding each defendant party / mortgagor. It argues that the Rule does not prohibit this, and that "it is not unheard of to have separate deficiency hearings against co-respondents" - which presumably it must be suggesting, would give rise to different amounts of deficiency calculation.

[69] However, that interpretation is at odds with the *Civil Procedure Rule* 72.11(3), which expressly suggests that each mortgage foreclosure only has one effective date of default judgment which is then stayed pending enforcement - Practice Memorandum No. 1, para. 2.11. The stay of the judgment remains in effect only for six months - CPR 72.11(6) and 72.12(1) and unless a motion for deficiency is filed beforehand, the judgment is extinguished.

[70] In its written submission of August 9, 2011, the Bank stated:

> As you know [in] this case the Applicant resold the property outside of the six month time deadline to file the Notice of Motion for Deficiency. There does not

> appear to be any jurisprudence reported in respect of Rule 72.12 and on the issue of whether the Applicant's deficiency claim crystallizes at the end of the six month mark. We submit that an Applicant's claim should not crystallize in the six month period.

[71] Once the motion is filed in time, the default judgment is no longer stayed, but is open to be enforced. There is no explicit deadline for such enforcement process.

[72] Once a default judgment is enforced, as triggered by the issuance of an order for deficiency, the judgment amount is crystalized and in my view, should not, and cannot be amended *vis-a-vis* another jointly and severally liable mortgagor / party to the action.

[73] Where the Bank had **chosen** initially to proceed against only one of the mortgagors in this case, they should not, and cannot legally, seek to obtain another deficiency judgment against Ms. Stevens later, for a different amount.

[74] The Bank could have obtained an earlier order for substituted service, awaited that service being effected on Ms. Stevens, and claimed deficiency

judgment against both Mr. and Mrs. Stevens at the same time, and they would have been equally liable to the Bank.

[75] Having decided to proceed against Mr. Stevens alone, the Bank is precluded from claiming a second (i.e. for a different amount) deficiency judgment order against Ms. Stevens.

[76] The Bank's interpretation of the Rules would mean that if a matter proceeded to a second deficiency judgment, not only is it arguable that the judge hearing the first deficiency judgment was seized with the matter, precluding me from deciding it, but the result of different judges dealing with the first and second deficiency judgment, (including the amount to be deducted under CPR 72.13(1) and what protective disbursements may be claimed) is likely to be inconsistent factual findings and outcomes, for the same judgment.

The applicability of the doctrine of issue estoppel

[77] Even if the Bank could otherwise proceed to a second deficiency judgment calculation and obtain a separate judgment amount against Ms. Stevens alone, I conclude that this Court should not condone such a result on the following grounds:

(i) The doctrine of issue estoppel ought to be invoked;

(ii) on policy grounds it is an undesirable outcome which could see mortgagors to the same mortgage somewhat arbitrarily face different deficiency judgment amounts (which may encourage mortgagees to attempt two deficiency motions in cases such as herein since they may obtain greater monetary awards as a result); and

(iii) although to be invoked only in extraordinary circumstances, this Court does have a discretion to refuse to order a deficiency judgment as against Ms. Stevens alone for the sought after greater claim than that as against Mr. Stevens in the unusual circumstances of the case at Bar - see for example *Federal Business Development Bank v. Silver Spoon Desserts Enterprises Ltd.* (1995) 144 N.S.R. (2d) 161 [1995] N.S.J. No. 359 (CA) per Bateman, JA (Freeman, JA concurring) at para. 15: "The rationale behind equitable intervention to disallow the

> deficiency, where the mortgagee has bid successfully, is to ensure no unfairness and, in particular, no double recovery by the mortgagee." [and Justice Hallett's comments in *Canadian Imperial Bank of Commerce v. R. England's Warehouse Ltd.* at supra at paras. 58 - 59]; or to similar effect, based on abuse of the Court's process, Justice Davison's decision in *Fancy v. Clayton Professional Centre Ltd.* 2007 NSSC 66 at paras. 28 - 31 and the present CPR 88.02.

[78] Specifically regarding issue estoppel, the Supreme Court authoritatively dealt with this doctrine in *Danyluk v. Ainsworth Technologies Inc.* [2001] 2 SCR 460 where Binnie, J. for the Court commented on the nature and extent of issue estoppel at paras. 18 - 201, 24 - 25, and 33, 62 and 80:

> IV. Analysis
>
> 18 The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry. The appellant chose the ESA as her forum. She lost. An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.
>
> 19 Finality is thus a compelling consideration and judicial decisions should generally be conclusive of the issues decided unless and until reversed on appeal.

However, estoppel is a doctrine of public policy that is designed to advance the interests of [page474] justice. Where as here, its application bars the courthouse door against the appellant's $300,000 claim because of an administrative decision taken in a manner which was manifestly improper and unfair (as found by the Court of Appeal itself), a re-examination of some basic principles is warranted.

20 The law has developed a number of techniques to prevent abuse of the decision-making process. One of the oldest is the doctrine estoppel per rem judicatem with its roots in Roman law, the idea that a dispute once judged with finality is not subject to relitigation: Farwell v. The Queen (1894), 22 S.C.R. 553, at p. 558; Angle v. Minister of National Revenue, [1975] 2 S.C.R. 248, at pp. 267-68. The bar extends both to the cause of action thus adjudicated (variously referred to as claim or cause of action or action estoppel), as well as precluding relitigation of the constituent issues or material facts necessarily embraced therein (usually called issue estoppel): G. S. Holmested and G. D. Watson, Ontario Civil Procedure (loose-leaf), vol. 3 Supp., at 21 s. 17 et seq. Another aspect of the judicial policy favouring finality is the rule against collateral attack, i.e., that a judicial order pronounced by a court of competent jurisdiction should not be brought into question in subsequent proceedings except those provided by law for the express purpose of attacking it: Wilson v. The Queen, [1983] 2 S.C.R. 594; R. v. Litchfield, [1993] 4 S.C.R. 333; R. v. Sarson, [1996] 2 S.C.R. 223.

...

24 Issue estoppel was more particularly defined by Middleton J.A. of the Ontario Court of Appeal in McIntosh v. Parent, [1924] 4 D.L.R. 420, at p. 422:

> When a question is litigated, the judgment of the Court is a final determination as between the parties and their privies. Any right, question, or fact distinctly put in issue and directly determined by a Court of competent jurisdiction as a ground of recovery, or as an answer to a claim set up, cannot be re-tried in a subsequent suit between the same parties or their privies, though for a different cause of action. The right, question, or fact, once determined, must, as between them, be taken to be conclusively established so long as the judgment remains. [Emphasis added.]

This statement was adopted by Laskin J. (later C.J.), dissenting in Angle, supra, at pp. 267-68. This description of the issues subject to estoppel ("[a]ny right, question or fact distinctly put in issue and directly determined") is more stringent than the formulation in some of the older cases for cause of action estoppel (e.g., "all matters which were, or might properly have been, brought into litigation", Farwell, supra, at p. 558). Dickson J. (later C.J.), speaking for the majority in Angle, supra, at p. 255, subscribed to the more stringent definition for the purpose of issue estoppel. "It will not suffice" he said, "if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment." The question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceeding. In other words, as discussed below, **the estoppel extends to the material facts and the conclusions of law or of mixed fact and law ("the questions") that [page477] were necessarily (even if not explicitly) determined in the earlier proceedings.**

25 The preconditions to the operation of issue estoppel were set out by Dickson J. in Angle, supra, at p. 254:

> (1) that the same question has been decided;
>
> (2) that the judicial decision which is said to create the estoppel was final; and,
>
> (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.
>
> ...

33 The rules governing issue estoppel should not be mechanically applied. **The underlying purpose is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case.** (There are corresponding private interests.) **The first step is to determine whether the moving party (in this case the respondent) has established the preconditions to the operation of issue estoppel set out by Dickson J. in Angle, supra. If successful, the court must still determine whether, as a matter of discretion, issue estoppel ought to be applied:** British

> Columbia (Minister of Forests) v. Bugbusters Pest Management Inc. (1998), 50 B.C.L.R. (3d) 1 (C.A.), at para. 32; Schweneke v. Ontario (2000), 47 O.R. (3d) 97 (C.A.), at paras. 38-39; Braithwaite v. Nova Scotia Public Service Long Term Disability Plan Trust Fund (1999), 176 N.S.R. (2d) 173 (C.A.), at para. 56.
>
> ...
>
> 62 The appellant submitted that the Court should nevertheless refuse to apply estoppel as a matter of discretion. There is no doubt that such a discretion exists. In General Motors of Canada Ltd. v. Naken, [1983] 1 S.C.R. 72, Estey J. noted, at p. 101, that in the context of court proceedings "such a discretion must be very limited in application". In my view the discretion is necessarily broader in relation to the prior decisions of administrative tribunals because of the enormous range and diversity of the structures, mandates and procedures of administrative decision makers.
>
> ...
>
> 80 As a final and most important factor, the Court should stand back and, taking into account the entirety of the circumstances, consider whether application of issue estoppel in the particular case would work an injustice.

[79] In the case at Bar, I find that, in essence, the “same question” has already been decided by Duncan, J. on August 26, 2010.

[80] The only difference is that Ms. Stevens did not have the opportunity to be present, and challenge the Bank’s claims, because she was not served until June 16, 2011. She did not respond to that substituted service, however she has had a

chance to challenge the Bank's claims, and so been afforded procedural fairness, albeit only on July 19, 2011, but not regarding the August 26, 2010 hearing.

[81] I also find that the decision of Duncan, J. was a "final" decision. The calculation of the deficiency owing was the final step in the foreclosure proceeding.

[82] As to whether the "parties or their privies were the same persons" as the parties to the August 26, 2010 hearing, I find that they were. Had Ms. Stevens been properly served, she would be subject to the identical judgment that was rendered against Mr. Stevens.

[83] I note that the presiding judge could have dispensed with the requirement that she receive her own specific notice of the August 26, 2010 hearing - CPR 72.12(2).

[84] Ms. Stevens was privy to the August 26, 2010 hearing by virtue of her being the spouse of Mr. Stevens, by being joint tenant with him on the property in

question, and by being a joint and severally liable mortgagor with him under the terms of the mortgage.

[85] As Binnie, J. said for the Court in *Danyluk* supra at para. 60:

> 60 The concept of "privity" of course is somewhat elastic. The learned editors of J. Sopinka, S. N. Lederman and A. W. Bryant in The Law of Evidence in Canada (2nd ed. 1999), at p. 1088 say, somewhat pessimistically, that "[i]t is impossible to be categorical about the degree of interest which will create privity" and that determinations must be made on a case-by-case basis. In this case, the parties are identical and the outer limits of "mutuality" and of the "same parties" requirement need not be further addressed.
>
> [See also Justice Davison's recitation of relevant jurisprudence in *Fancy* supra, at paras. 16 - 22.]

[86] Having considered the circumstances in this case, I do not find there are reasons to exercise the residual discretion that I have to refuse to apply the doctrine of issue estoppel in this case. To do justice between the parties here requires that issue estoppel be invoked by the Court to preclude the Bank from having any greater deficiency judgment against Ms. Stevens than it does against Mr. Stevens as assessed on August 26, 2010.

Conclusion

[87] My sense is that, it is more practical, more equitable, and more consistent with the rules, the practice memorandum and existing case law, that I interpret the *Civil Procedure Rules* in a way which effectively provides for only one default judgment on this foreclosure sale and possession order, and therefore only one deficiency amount calculation.

[88] Moreover, the mortgage contract between the parties limits liability for deficiency on a joint and several basis. The Bank contractually agreed with Mr. and Ms. Stevens that they would be jointly and severally liable. The Bank then sought and was awarded deficiency judgment against Mr. Stevens. Ms. Stevens is jointly and severally liable for this amount by contract. It would be a breach of the mortgage agreement for the Bank to be awarded increased liability against Mr. Stevens. It would also be appropriate for this Court to invoke the doctrine of issue estoppel and/or abuse of process to prevent the Bank from claiming any greater deficiency judgment against Ms. Stevens then against Mr. Stevens.

[89] I conclude that the Bank is only entitled to claim the amount of deficiency judgment of $95, 073.21 (as ordered by Justice Duncan as against Mr. Stevens on

August 26, 2010) as against Ms. Stevens. In my view I should not, and cannot, alter the decision of Justice Duncan, in so far as the deficiency calculation that was determined on August 26, 2010.

The Deficiency Calculation in this Case

[90] In light of the same effective date of default judgment (of 15 days after January 28, 2010), a calculated deficiency judgment of $95,073.21 on August 26, 2010, and because I find that the Bank has recently given Ms. Stevens proper notice, to which she has not responded, the Bank is therefore entitled to a deficiency judgment against Ms. Stevens of $95,073.21 as of August 26, 2010 and I make no order as to costs.

[91] Judgment accordingly.

J.